

# FOLEY LARDNER

ATTORNEYS AT LAW

WASHINGTON HARBOUR  
3000 KS~EEi. N.W.. SUITE!OO  
WASHINGTON, D.c. 20007-5143  
TELEPHONf: 202.672.5300  
FACSIMiLE; 202.672.5399  
WWW.FOLEYLARDNER.COM

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## FACSIMILE

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Total # of Pages 6 (including this page)

TO:	PHONE #:	FAX #:
Ms. Susan Schneider Defense Acquisition Regulations Council	(703) 602-0326	(703) 602-0350

From :	David T. Ralston, Jr.
Email Address :	Dralston@folcylaw.com
Sender's Direct Dial :	202.295.4097
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Via Electronic Mail

Defense Acquisition Regulations Council Attn: Ms. Susan Schneider  
OUSD (AT&L) DPAP (DAR)  
II\Im 3C132  
3062 Defense Pentagon  
Washington, DC 20301-3062

July 14, 2003

Re: DF ARS Case 2002-DOO3

**Dear Ms. Schneider:**

FOLEY. LARDNER  
WASHINGTON HARBOUR  
3000 I< STRUT. N.W., SUITE 500 WASHINGTON, D.C. 20007.5143 202.672.5300 T~  
202.672.5399 FAX  
~.lol~lardner.com  
WRITER'S OIRECT UN! 202.295.4097 dfal«Me!oliXIaw.com EMAIL  
CLIENT/MATTER NUMBER  
425376.0006

Foley & Lardner represents the Correctional Vendors Association (CV A). By Federal Register announcement dated May 15, 2003, the Department of Defense (DoD) solicited comments on the proposed rule by DoD to implement Section 811 of the National Defense Authorization Act for Fiscal Year 2002 ("Section 811") and Section 819 of the Defense Authorization Act for Fiscal Year 2003 ("Section 819") (collectively Sections 811/819), codified at 10 U.S.C. 241 On. The proposed rule would amend 48 CFR Parts 208, 219 and 252. Provided herein are CV A's comments on the proposed rule.

CV A provided comments on the Interim Rule published on April 26, 2002 concerning Section 811. Several of the issues addressed in those comments were subsequently addressed in Section 819. To the extent CV A's comments on the Interim Rule were not addressed by DoD in the proposed final rule or by Section 819, CV A urges again that DoD consider CV A's recommendations in the context of the final rule.

## CV A Backeround

CV A is a non-profit trade association that represents more than 50 vendors from across the Nation that sell products to Federal Prison Industries, Inc. ("FPI"). CV A member products are used by FPI in the federal inmate work program to manufacture finished goods for use by federal agencies. These products include furniture components, textiles, electronic parts and metals.

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## CV A's Comments on the Pro~osed Rule

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DoD's discussion of the proposed rule is interwoven with its response to comments on the Interim Rule, and DoD's discussion reflects those issues that were subsequently addressed in Section 819. Therefore, CV A's comments track the topics addressed in the Section A, Background, in the Federal Register announcement.

### Small Business Issues

The proposed rule would correctly include FPI in small business set-asides under 15 U.S.C. 644. Fed. Reg. 26266. 26269. CV A supports the proposed changes to Part 208 (208.602(a)(iv)(C»)). Part 219 and 252 that serve to include FPI in small business set-asides, and that expressly require FPI be solicited and a timely offer from FPI be considered by the agency.

2.

## Micro- Purchase Exclusion

DoD COITectly observes that the requirements of 18 U.S.C. 4124 apply regardless of whether the purchase is below the mjcro-purchase threshold. Fed. Reg. 26266. Micro-purchase issues are solely within the jurisdiction ofFPI.

3.

## Com:petitive Procedures

No substantive comment. DoD correctly observes that Section 819 provided further guidance on the definition of ' competitive procedures." Fed. Reg. 26266.

4.

## GSA Multiple Award Schedules

DoD correctly observes that Section 819 included GSA's multiple award schedule progr8Iil within the definition of "competitive procedmes." Fed. Reg. 26266-67. CV A supports the proposed 208.602«a)(iv)(A) requirement that the "fair opportunity procedures in FAR 16.505" be employed for multiple award task or delivery order contracts.

CV A also supports the requirement in proposed 208.602(a)(iv)(C) that when multiple award schedule procedures are employed, the Contracting Officer is required to establish and communicate to FPI the requirements of the agency and the evaluation factors used for source selection, and to consider a timely offer n-om FPI.

These requirements are essential to permitting FPI the opportunity to compete within the context of the multiple award schedule program. Absent these requirements, use of the multiple award schedule would violate 10 V.S.C. 2410n and 18 U.S.C. 4124, as DoD observes. Fed. Reg. 26267.

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## Comparability

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CV A supports the requirement in proposed 208.602(a)(ii) that the comparability determination be supported

by written documentation including the rationale for the decision and the results of the market research. This requirement will substantially enhance the quality of Contracting Officer decision making on comparability.

6.

7.

8.

## The Resolution Process

No comments.

## Delegation of Authority

No comments.

## Unilateral Decision at 208.602(a)

As noted in the comments on the Interim Rule, the "unilateral decision" language in 208.602(a) should be removed. Although that language mimics Section 819, it adds nothing because it does not provide any guidance to Contracting Officers in exercising their discretion. It is a well-established principle of law that a party vested with contractual discretion must exercise his discretion reasonably. ~ ~ Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Ct. 787, 790 (1995). Moreover, it suggests, wrongly, that the Contracting Officer's discretion in the comparability process is not subject to judicial review under the Administrative Procedure Act ("APA").

9.

10.

11.

## Terminology

No Comments.

## Previous DoD Guidance

No comments.

## Sole-source Purchases

DoD correctly observes that 10 U.S.C. 2410 does not permit sole-source purchases. Moreover, by definition, if a product is on the FPI Schedule) sole-source purchasing from the private sector would not be permissible under the Competition in Contracting Act.

12.

## Architect-engineer Contracts

DoD correctly observes that the requirements of 10 U.S.C. 2410n are imposed on the Government. DoD on government contractors. In like manner, the requirement of 18 U.S.C. 4124 that federal agencies shall purchase their needs from FPI if available, always has been, and is now,

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imposed on federal departments and agencies not contractors. Proposed 208.670 (which mimics 10 V.S.C. 2410n(e) simply states the obvious - 10 V.S.C. 2410n and 18 U.S.C. 4124 are not and never have been, applicable to contractors.

Language should be added to proposed Section 208.670 explaining that 208.670 does not excuse Contracting Officers from compliance with 18 V.S.C. 4124 or 10 V.S.C. 241011, as implemented by 208.602. 18 U.S.C. 4124 remains applicable to DoD (other than as provided in 10 V.S.C. 2410n) and continues to require that DoD obtain its needs from FPI if such goods are on the FPI Schedule. If Congress had intended to excuse DoD from the application of 18 U.S.C. 4124, Congress certainly knows how to but did not do so in Section 811/819. To the contrary, Congress provided the comparability/competitive procedures process in 10 U.S.C. 2410n.

Thus, a DoD contract to obtain goods on the FPI Schedule from a private firm (unless permitted by a competitive procedure in compliance with 208.602) would be an unlawful contract in violation of 18 U.S.C. 4124 (and by implication, 10 U.S.C. 2410n). The fact that a private firm is not covered by 18 V.S.C. 4124, 10 U.S.C. 24100 or 208.602 does not mean that federal agencies, including DoD, are excused from compliance with these laws. In sum, the clarifying language CV A proposes would assure that Contracting Officers understand that proposed 208.670 does not subvert 208.602, and cannot be employed to that end.

Language should also be added to proposed 208.670 clarifying that DaD contracts, particularly architect-engineering contracts, may, and should, include instructions that FPI goods must be used to supply DaD unless excused by 208.602. This language would avoid the situation arising in which a contractor or a subcontractor illegally supplies DoD with private sector goods that DoD must obtain from FPI in compliance with 10 V.S.C. 2410n and 208.602.

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## Use of the Term "Solicitation"

Language should be added to proposed 208.602(a)(iv) specifying how Contracting Officers are to notify FPI of

a solicitation. Specific language will enhance Contracting Officer compliance with the requirements in 208.602(a)(iv)(B) to include FPI in the solicitation process (a predicate to the requirement to consider a timely offer from FPI), and the requirements in 208.602(a)(iv)(C) to establish and communicate to FPI the agency's requirements and the evaluation factors used in source selection. The FPI email box is a convenient method of notification to FPI, and should be specified in 208.602(a)

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Use of the Phrase "that Best Meet the Government's Needs"

No comments.

Application of Priorities for Use of Government Supply Sources

No comments

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Your consideration of the foregoing is appreciated. questions.

Respectfully submitted,

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Please contact the undersigned with

FOLEY & LARDNER

David T. D.  
Kulster  
Hester

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David T. filalston, Ir.  
Philip A. ~acke

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Counsel for Correctional Vendors Association, Inc.

cc: The Honorable Angela B. Styles Ann;nistrator  
\_\_\_\_Office of Federal Procurement Policy Office ofManagcxnent and Budget

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